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December 15, 1950
Op. No. 50-276

Wilson
Mr. P. A. Isley
State Dairy Commissioner
State House
Phoenix, Arizona

Dear Mr. Isley:

This is in reply to your letter of December 13, 1950, wherein you ask us to answer a question written to you by Holmes & Morrison, Attorneys at Law, Tucson, Arizona, in regard to drivers of trucks delivering milk for the Flint Dairy. It is very difficult to determine just what they want from what they have written. For the purpose of this opinion we are assuming that they want to know if persons employed by the Flint Dairy to distribute milk are required to secure a milk products distributor's license. It will first be required to determine whether these drivers are employees or independent businessmen. It appears the Dairy hires and fires them at will and that the Dairy retains control over their work.

In the case of the Industrial Commission v. Byrne, 62 Ariz. 132, the court said:

"The test to determine if one is an employer or employee is whether the employer retains supervision or control of the work."

In another recent case, Industrial Commission v. Meddock, 65 Ariz. 324, the court said:

"Employees employed under contract to quarry flag stone and building rock of certain quality and at specific price per ton, payable twice per month, were employees and not independent contractors in view of employer's right to control the work and the right to terminate employment on one day's notice."

In the case of Barron v. Ambort, 64 Ariz. 209, the court had before it the compensation to be paid a deceased employee, and said as follows:

"Where deceased employee was working under contract calling for a salary of \$75.00 per month, plus 4% commission of all sales, the latter constituted a part of the wages

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and should have been included in determining actual monthly wage upon which to base an award."

From these decisions and our understanding of the facts, it appears that these men evidently are employees and not independent businessmen, and are not self-employed.

There are three classes of license issued by the Dairy Commission. They are dairy products distributors, Section 50-906, milk products manufacturers, Section 50-907 and producer distributor and producer manufacturer, Section 50-908. There are a few other permits issued without fee which do not come within the question.

It is therefore our opinion that as long as the Dairy retains control over the actions of the drivers of the trucks, whether the Dairy company owns the trucks or not, they are employees of the Dairy and would not be required to secure a dairy products distributor's license, if they distribute and sell exclusively the milk or milk products furnished by the Flint Dairy.

Very truly yours,

FRED O. WILSON
Attorney General

CHAS. ROGERS
Assistant Attorney General

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